Mohd Khayry bin Ismail v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–45–02 OF 2013

MAH WENG KWAI, TENGKU MAIMUN AND HAMID SULTAN JJCA

5 MAY 2014

Evidence — Documentary evidence — Video tapes and/or recordings — CCTV recordings of accused converted into compact disc ('CD') for use as exhibit at trial — Correctness of matter recorded on CD not in issue — Whether CD inadmissible in evidence because certificate under s 90A of the Evidence Act 1950 not tendered — Whether production of certificate permissive and not mandatory — Whether persons involved in extraction of CCTV recording had testified in court — Whether accused's confessions to third parties claiming responsibility for crime relevant and admissible

The appellant was convicted and sentenced to death by the High Court for the murder of two persons ('the deceased') who were killed when a bomb concealed inside two pomelos placed outside a 12th-floor apartment unit exploded. In the trial court, the prosecution had adduced evidence of a CCTV recording taken at the apartment block which showed the appellant on the morning in question entering the lift carrying a bag, then getting off at the 12th floor while still carrying the bag and minutes later re-entering the lift on the same floor without the bag and then leaving the apartment block. The evidence showed the appellant knew the deceased and that he had told two of his friends, who testified at the trial, that he wanted to burn the gambling outlet located on the ground floor of the apartment block as well as its owner (one of the deceased) because of the heavy losses he had incurred there. Evidence was adduced to show the appellant had acquired materials to make the bomb prior to the incident and that several hours before the bombing took place he had threatened one of the deceased when she refused to lend him RM20,000. The evidence also showed that a day after the incident the appellant had told two persons, PW13 and PW16, that he was responsible for the crime. In his instant appeal against conviction and sentence, the appellant contended, inter alia, that the trial judge erred in accepting the evidence of PW13 and PW16 about his confessions at face value without testing whether that evidence was true and that evidence of the CCTV recording taken both at the apartment block and at a supermarket (which showed the appellant buying two pomelos) were inadmissible because no certificate concerning the recordings was tendered under s 90A of the Evidence Act 1950 and that the person who made a copy of

the recordings into a compact disc to be tendered in court as an exhibit did not testify that the disc was produced in accordance with s 90A.

Held, dismissing the appeal:

(1) In the instant case, there was no issue as to the correctness of the recording or of tampering, etc. Even if s 90A was applicable, a certificate was not sine qua non for admissibility. As was asserted by the Court of Appeal in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1, production of the certificate was permissive and not mandatory. The witnesses who were involved in extracting the CCTV recording were present in court and gave evidence. Ultimately it was for the court to decide the issue of relevancy and admissibility. Whether a piece of evidence was relevant was a question of law. Even without the admission of the two CCTV recordings, the case against the appellant was proved beyond reasonable doubt based on all the relevant circumstantial evidence (see paras 9(b)(iv), (v) & 11).

(2) With regard to the confession statements that were made to PW13 and PW16, the issue was one of credibility and finding of facts. There was no reason for the evidence of PW13 and PW16 to be rejected and it was not shown that the 'fairness rule' had been breached. Very importantly, the appellant was not convicted solely based on the confession statements which, in the instant case, passed the test of relevancy as well as admissibility. The only issue, if any, was the probative force of the evidence and that fell within the realm of the trial judge (see para 9(b)(vii)).

(3) The victims in this case were known to the appellant; his intention to cause harm was hatched before the incident; the items he used to make the explosives were traced to him; the motive for the bombing was established; the appellant had confessed about the incident to his friends and the trial court had made a finding that there was no plausible explanation for the appellant's conduct. Although the prosecution's case was based on circumstantial evidence, the narrative was such that any reasonable tribunal properly appraised would have had no reasonable alternative but to find the accused guilty as charged (see paras 4–5).

(4) There was sufficient material to support the charge and the view taken by the trial court on the relevant issues was a reasonable view of the evidence on record. The court had followed *Radhi*'s direction and had rightly applied the maximum-evaluation and beyond-reasonable-doubt tests (see para 10).

[Bahasa Malaysia summary

Perayu telah disabit dan dihukum dengan hukuman mati oleh Mahkamah Tinggi untuk pembunuhan dua orang (si mati) yang terbunuh apabila bom

yang disembunyikan di dalam dua biji limau bali yang diletakkan di luar unit pangsapuri 12 tingkat meletup. Di dalam mahkamah perbicaraan, pihak pendakwaan mengemukakan keterangan rakaman CCTV yang diambil di blok pangsapuri yang menunjukkan perayu pada pagi yang dipersoalkan masuk ke dalam lif membawa bag, kemudian keluar ke tingkat 12 dengan membawa beg tersebut dan beberapa minit kemudian masuk ke dalam lif pada tingkat yang sama tanpa beg tersebut dan meninggalkan blok pangsapuri. Keterangan menunjukkan perayu mengenali si mati dan bahawa dia telah memberitahu dua rakan-rakannya, yang memberi keterangan semasa perbicaraan, bahawa dia hendak membakar cawangan berjudi yang terletak di tingkat bawah blok pangsapuri dan juga pemiliknya (salah seorang daripada si mati) kerana kerugian besar yang dia telah ditanggung di situ. Keterangan yang dikemukakan menunjukkan perayu telah mendapatkan bahan-bahan sebelum kejadian dan bahawa beberapa jam sebelum kejadian letupan berlaku dia telah mengancam salah seorang si mati apabila dia enggan meminjamkan RM20,000 kepadanya. Keterangan juga menunjukkan bahawa sehari selepas kejadian perayu telah memberitahu dua orang, PW13 dan PW16, bahawa dia bertanggungjawab untuk jenayah tersebut. Di dalam rayuannya terhadap sabitan dan hukuman, perayu mendakwa, antara lain, bahawa hakim perbicaraan telah terkhilaf dengan menerima keterangan PW13 dan PW16 mengenai pengakuannya atas nilai muka tanpa menguji sama ada keterangan tersebut adalah benar dan bahawa keterangan rakaman CCTV yang kedua-duanya diambil di blok pangsapuri dan di pasar raya (yang mana menunjukkan perayu telah membeli dua biji limau bali) tidak boleh dipakai kerana tidak terdapat sijil mengenai rakaman-rakaman yang ditender di bawah s 90A Akta Keterangan 1950 dan bahawa orang yang membuat salinan rakaman-rakaman di dalam cakera padat yang akan ditender di dalam mahkamah sebagai ekshibit tidak memberi kenyataan bahawa cakera padat dibuat menurut s 90A.

Diputuskan, menolak rayuan:

(1) Dalam kes ini, tidak terdapat isu mengenai kesahihan rakaman atau penyelewengan dll. Meskipun s 90A diguna pakai, sijil tersebut bukanlah *sine qua non* untuk kebolehterimaan. Seperti yang ditegaskan oleh Mahkamah Rayuan di dalam kes *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1, pengeluaran sijil adalah permisif dan tidak mandatori. Saksi-saksi yang terlibat dalam mengekstrak rakaman CCTV hadir di mahkamah dan memberikan kenyataan. Pada pengakhirannya adalah untuk mahkamah untuk memutuskan isu relevansi dan kebolehterimaan. Sama ada suatu keterangan adalah relevan adalah suatu persoalan undang-undang. Walaupun tanpa penerimaan kedua-dua rakaman CCTV, kes terhadap perayu telah

terbukti melampaui keraguan munasabah berdasarkan kesemua keterangan ikut keadaan yang relevan (lihat perenggan 9(b)(iv), (v) & 11).

(2) Berkenaan dengan kenyataan pengakuan yang dibuat kepada PW13 dan PW16, isu adalah mengenai kredibiliti dan dapatan fakta. Tidak ada sebab mengapa keterangan PW13 dan PW16 perlu ditolak dan tidak ditunjukkan bahawa 'fairness rule' telah dimungkiri.Yang paling penting, perayu tidak disabit kan semata-mata berdasarkan kenyataan pengakuan yang mana, dalam kes ini, lulus ujian relevansi dan juga kebolehterimaan. Hanya satu isu, sekiranya ada, adalah kekuatan probatif keterangan dan bahawa ia terangkum di dalam skop hakim perbicaraan ((lihat perenggan 9(b)(vii)).

(3) Mangsa-mangsa di dalam kes ini dikenali oleh perayu, niatnya untuk melakukan kecederaan telah dirancang sebelum kejadian; bahau-bahau yang digunakan untuk membuat bahan letupan menunjukkan kepadanya; motif untuk pengeboman telah dibuktikan; perayu telah mengaku tentang kejadian kepada kawan-kawannya dan mahkamah perbicaraan telah membuat dapatan bahawa tidak terdapat penjelasan yang lain untuk kelakuan perayu. Meskipun kes pihak pendakwaan, berdasarkan keterangan ikut keadaan, naratif adalah bahawa mana-mana tribunal yang munasabah tidak mempunyai alternatif yang munasabah tetapi untuk mendapati tertuduh bersalah seperti dituduh (lihat perenggan 4–5).

(4) Terdapat material yang mencukupi untuk menyokong tuduhan dan pandangan yang diambil oleh mahkamah perbicaraan tentang isu relevan adalah pandangan yang berpatutan terhadap keterangan rakaman. Mahkamah mengikut arahan kes *Radhi* dan dengan betul menggunapakai ujian penilaian maksima dan melampaui keraguan munasabah (lihat perenggan 10).]

Notes

For a case on video tapes and/or recordings, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1577.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Amrrita Lai Hazra v Emperor 42 Cal 957 (refd)
Aung Tun & Anor v PP [2014] 1 MLJ 784, CA (refd)
Bandahala bin Undik v PP [2014] 1 CLJ 708, CA (refd)
Bibhabati Devi (Smt) v Ramendra Narayan Roy & Ors AIR 1947 PC 19 (refd)
Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1, CA (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)

Kartar Singh & Anor v Rex [1952] 1 MLJ 85b (refd)
Liang Weng Heng v PP [2014] 2 MLJ 855, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314, CA (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
R v Maqsud Ali [1965] 2 All ER 464 (folld)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Evidence Act 1950 ss 3, 6, 61, 90A, 136
Penal Code ss 90A, 299, 300, 302

Appeal from: Criminal Suit No 45–93 of 2010 (High Court, Kuala Lumpur)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellants.
Aslinda bt Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal against conviction and sentence of the High Court for murder of two persons came up for hearing on 20 January 2014 and on the same day we dismissed it. My learned brother Mah Weng Kwai JCA and my learned sister Tengku Maimun bt Tuan Mat JCA have read and approved the draft judgment. This is our judgment.

[2] The appellant was charged as follows:

> First charge
>
> Bahawa kamu pada 29 Ogos 2010 di antara jam lebih kurang 8 pagi dan 8.30 pagi di hadapan rumah No 2-12-4, Apartment Desa Tun Razak, Blok 2, Jalan 8/118B, Desa Tun Razak, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, telah membunuh NG SIEW HONG (No K/P: 590113-01-5966), oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.
>
> Second charge
>
> Bahawa kamu pada 29 Ogos 2010 di antara jam lebih kurang 8.00 pagi dan 8.30 pagi di hadapan rumah No 2-12-4, Apartment Desa Tun Razak, Blok 2, Jalan 8/118B, Desa Tun Razak, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, telah membunuh GOH YONG SENG (No K/P: 750908-05-5176), oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

[3] The petition of appeal dated 18 September 2013 reads as follows: A

(a) the learned trial judge erred in fact and in law when Her Ladyship found the appellant guilty of two counts of murder under s 302 of the Penal Code and sentenced him to death. The learned trial judge erred when Her Ladyship found that the prosecution had proven its case beyond reasonable doubt; B

(b) the learned trial judge erred in fact and in law when Her Ladyship found that a prima facie case had been out in respect of the two charges of murder. Her Ladyship failed to realise that the evidence be it direct or circumstantial was insufficient to connect the appellant with the incident on the 29 August 2010; C

(c) The learned trial judge erred in fact and law when Her Ladyship:

(i) took into account admissions allegedly made by the appellant to the prosecution witness and relied on them. The learned trial judge failed to realise that these admissions were equivocal and therefore it was unsafe to rely on them; D

(ii) took into account the appellant's conduct to connect the appellant with the incident. The learned trial judge failed to realise that the appellant's conduct, if at all it was proven was irrelevant; E

(iii) failed to realise that the prosecution had not discharged its heavy burden of proving its case based on circumstantial evidence;

(iv) the learned trial judge erred in law when Her Ladyship imposed a very high burden on the appellant to raise a reasonable doubt; and F

(v) the learned trial judge erred in fact and in law when Her Ladyship failed to consider the appellant's defence as well as the evidence of the appellant's witness(es). G

The following are the additional grounds of appeal as contained in the petition dated 6 November 2013:

(a) that the learned trial judge misdirected herself when Her Ladyship relied on the CCTV evidence recorded at the Desa Tun Razak Apartment and Giant Supermarket to the prejudice of the appellant when these CCTV recordings were clearly inadmissible in law; H

(b) the learned trial judge erred when Her Ladyship failed to recognise that there was no evidence from the pathologist (PW10 and PW15) that the injuries on the deceased persons were sufficient in the ordinary course of nature to cause death; I

(c) the learned trial judge erred in law in that Her Ladyship accepted the evidence of PW13 (Mohd Nordin bin Abdullah) and PW16 (Abdul

Wahid bin Muhammed Akim) with regard to the appellant's admissions and/or confessions at face value without subjecting the evidence to a test of maximum evaluation;

(d) with regard to the said admissions and/or confessions referred to para 3 above the learned trial judge erred when Her Ladyship failed to test its truth contents;

(e) the learned trial judge erred in law when Her Ladyship failed to:

(i) take into consideration many aspects of the evidence that spoke in favour of the appellant;

(ii) discuss the key differences between ss 299 and 300;

(iii) recognise that she acted on inadmissible evidence; and

(iv) recognise, in the alternative, that at its highest, this is a case of manslaughter.

PRELIMINARIES

[4] What is important to note in this case is that: (i) the victims were parties known to the accused; (ii) the accused's intention to cause harm was already hatched before the incident; (iii) the items used to make the explosives which caused the death were traced back to the appellant; (iv) the purchase of the items was also traced back to the appellant; (v) motive for the incident which caused the death was established; (vi) there was also confession made to the friends; (vii) the trial court also made a finding there was no plausible explanation for the accused's conduct.

[5] In essence, though the prosecution case was based on circumstantial evidence, the narrative was such that any reasonable tribunal properly appraised will have no reasonable alternative to the guilt of the accused. (see *Kartar Singh & Anor v Rex* [1952] 1 MLJ 85b).

[6] The learned trial judge in her 185 pages judgment had meticulously set out the facts, the law and the defence story in great detail. We are of the considered view that judicial time should not be spent to re-agitate the facts save to deal with the core issues.

BRIEF FACTS

[7] The appellant is known to the deceased. It was the case of the prosecution that the appellant had caused the explosion by placing two 'pomelo bombs'. The prosecution had adduced the reason for such conduct, and had also traced

the history in relation to how the bomb was placed in the apartment. The prosecution had relied on strong and cogent circumstantial evidence and two confession statements. The learned counsel for the prosecution has summarised the case and it reads as follows:

(i) that prior to the incident the appellant had told both PW17, his former employee, and PW11, his friend, of his desire to burn both the cafe and its owner (NSH) because of his gaming losses;

(ii) that about a month before the appellant had obtained two packets of 'mercun bola' from PW18, his former employee;

(iii) that on the night before the incident the appellant had tried to borrow a sum of RM20,000 from NSH. When she refused, she was threatened;

(iv) that at about 3am on the date of the incident, that is, on 29 August 2010, PW12 saw the appellant carrying a blue coloured bag and walking towards the lift. The following movements of the appellant were captured on CCTV: (a) when he was entering the lift while carrying a bag; (b) when he stepped out of the lift at the 12th floor with the bag; (c) when he walked back into the lift on the 12th floor, this time without the bag; and (d) when he walked out of the lift on the ground floor;

(v) that on the morning of the incident, the deceased persons and PW9 were trying to find out who had given them the pomelos and when they returned to the 12 floor, they noticed that the bag was still there. GYS lifted up one of the pomelos. It was followed by a loud explosion and PW9, who was slightly behind, saw the deceased persons were on fire and screaming in pain;

(vi) amongst the items recovered from the scene were pieces of 'mercun bola', pieces of blue coloured plastics, the two pomelos and two cable ties which were tied to a wire which was inserted inside one of the pomelos;

(vii) that a day after the incident, the appellant met with PW13, Mohd Nordin bin Abdullah, to request to stay in his office for a few days as he had domestic problems. As there was no water supply to his office PW13 then arranged for the appellant to stay with PW16, Abdul Wahid bin Muhammad Akim, instead;

(viii) that the appellant made two confessions to both PW13 and PW16 that he was responsible for the explosion;

(ix) The appellant was arrested about 26 days after the incident at PW16's house, and the appellant then led the police to the car park of the Sungai Buloh hospital where from the car the police seized a plastic packet containing white coloured cable-ties, etc. From his house, the police recovered a small saw, a red plastic bag containing five packets of matches and a 1.50m length of electrical casing; and

(x) on the next day the appellant led PW36 to the Giant Supermarket in Taman Connaught where the appellant had purchased the two pomelos and 1 screw driver.

[8] Learned counsel for the appellant canvassed the following grounds of appeal:

(a) the learned trial judge misdirected herself when she relied on the CCTV recordings at the Apartment Desa Tun Razak and at the Giant Supermarket when these recordings are clearly inadmissible in law;

(b) the learned trial judge erred when Her Ladyship failed to recognise that the pathologists (PW10 and PW15) did not state that the injuries on the deceased persons were sufficient in the ordinary course of nature to cause death;

(c) the learned trial judge erred when Her Ladyship failed to discuss the differences between ss 299 and 300 of the Penal Code;

(d) the learned trial judge erred in law when Her Ladyship accepted the evidence of both PW13 and PW16 on the confessions by the appellant at face value without subjecting them to a more rigorous test of credibility.

[9] We have read the appeal record and submissions of the parties in detail. We are grateful for the comprehensive submissions. After much consideration of the submission of learned counsel we are of the considered view the appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) on the issue of CCTV recording at the apartment learned counsel says (i) PW24 made a copy of the recording by downloading to a thumb drive with the aid of a CPU and later transferred into the CD which was marked as exh P13; (ii) CD was then handed over to PW 20 who prepared the report on the CD which was marked as exh P11. Learned counsel argues that there was no certificate tendered under s 90A of the Evidence Act 1950 ('EA 1950') and there was no oral evidence adduced by PW 24 that P13 was produced in accordance with the said section. Similar arguments were also placed in respect of the CCTV recording in Giant Supermarket;

(b) we do not find merit in the technical arguments placed by learned counsel. Our reasons, inter alia, are as follows:

(i) tape recording evidence or CCTV recording, etc at common law will be admissible based on 'res gestae' principles as truth of its contents although they may be hearsay or even self serving statement. Section 6 of EA 1950 and also other sections give statutory recognition to 'res gestae' principle in the widest form and is not restricted to the common law parameters. The test for relevancy is set out in the section itself in no uncompromising terms. There appears to be no comprehensive formula for its admissibility save as to guidelines suggested and/or imposed by courts all for good reasons. (see

Amrrita Lai Hazra v Emperor 42 Cal 957; *Bandahala bin Undik v Public Prosecutor* [2014] 1 CLJ 708). The said s 6 of the EA 1950 reads as follows:

Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

(ii) at common law any form of tape recording, video recording, etc; if relevant is made admissible if the court is satisfied of its accuracy and that it has not been tampered with, etc. The jurisprudence relating to its admissibility as well as ss 3 and 61 of the EA 1950 is set out in *Janab's Key to Criminal Procedure and Evidence*, (2nd Ed) and it reads as follows:

Document before the 1993 Amendment A 851 to the Act was defined in section 3 of the Act to mean any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter. Under the new amendment it includes any matter embodied in a disc, tape, film, sound track or other device whatsoever. A wide and extended meaning has been given to the definition 'document'. Previously documents at least related to things which could not be easily tampered with. Now documents include items which could be easily tampered with. It is submitted that the admission of such documents which could be easily tampered with must be admitted with caution.

In *R v Maqsud Ali* [1965] 2 All ER 464 Marshall J observed:

> … for many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The print as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording conversations. We see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence.

Such documents when produced for the inspection of the court are referred to as documentary evidence. Thus, documentary evidence may include not only documents in writing but also maps, plans, graphs, drawings, photographs, discs, tapes videotapes, films and negatives (see *Cross on Evidence*).

(iii) the amendments in relation to documents to EA 1950 do not in any way affect the common law position as set out in *R v Maqsud Ali*. The amendments allow further hearsay documents which may be difficult to be made admissible under the common law because of the hearsay rule and its prejudicial effect, to be made admissible provided the criteria set out in the amendments are complied with. The new amendments such as s 90A do not displace common law rules as to admissibility. That is to say if the party cannot admit a document in consequence of the common law restriction then he may get the document admitted under any of the new provisions such as s 90A, etc;

(iv) in the instant case, *R v Maqsud Ali* will apply, as there is no issue as to the correctness of recording or tampering, etc. Even if s 90A was to be made applicable, a certificate is not sine qua non for its admissibility. The Court of Appeal in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1 had asserted that the production of the certificate is permissive and not mandatory. The Court of Appeal on this issue observed:

> On reading through s 90A of the Act, we are unable to agree with the construction placed by learned counsel. First and foremost, s 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated earlier, s 90A was added to the Act in 1993 in order to provide for the admission of computer produced documents and statements as in this case. On our reading of this section, we find that under sub-s (1), the law allows the production of such computer-generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by sub-s (2). Thus, sub-s (2) is permissive and not mandatory. This can also be seen in sub-s (4) which begins with the words 'Where a certificate is given under subsection (2)'. These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof, then it would be incumbent upon them to establish that the document is produced by a computer in the course of its ordinary use by producing the certificate under sub-s (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the course of its ordinary use, as he is not an officer of the bank.

In the present case, Zainal—the person in charge of the operations of current accounts—testified that the statement of accounts was a computer printout. Therefore, in our view, the first part of sub-s (1) has been proved, ie that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-s (2) when firsthand evidence that 'the document so were produced by a computer' was given by Zainal. It would be superfluous to have a provision such as in sub-s (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s (6). Once the court accepts the evidence of Zainal—and in this case we cannot see any reason whatsoever for the court not to as there was no challenge by cross-examination — the prosecution has succeeded in proving what s 90A(1) requires them to prove: that such document was produced by the computer and in view of the deeming provision of sub-s (6), the second part is also proved.

(v) *Gnanasegaran*'s case was further endorsed by the Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800. In addition, the relevant witnesses who were involved in extracting the CCTV recording were present in court and gave evidence. Ultimately it is for the court to decide on the issue of relevancy as well as admissibility. Whether a particular evidence is relevant is a question of law. (see *Bibhabati Devi (Smt) v Ramendra Narayan Roy & Ors* AIR 1947 PC 19). Once it is decided as relevant, the rules governing admissibility of evidence are procedural in nature and not a substantive right. (see *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314). Once admitted the issue will only be as to probative force or whether it should be excluded under the fairness rule, etc (see s 136). The complaint as to admissibility on the grounds of hearsay is a factor which need to be taken by the courts before any evidence or documents is made admissible pursuant to s 136 of the EA 1950 without compromising on the 'fairness rule' (see *Liang Weng Heng v Public Prosecutor* [2014] 2 MLJ 855; [2013] MLJU 1283). Once made admissible, the real issue would be its probative force and not admissibility if the evidence is relevant. When prejudicial evidence is admitted breaching the 'fairness rule' the integrity of decision making process is compromised and in consequence appellate intervention may be necessary. The facts of the instant case do not warrant so on this issue.

(vi) the learned counsel for the appellant complained that the pathologists did not state that the injuries on the deceased persons were sufficient in the ordinary cause of nature to cause death and that the omission is fatal. We do not find much merit in the

submission. It is well established that a person can be convicted for murder purely on circumstantial evidence that too without the body being found and merely through documentary evidence. (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195). The Court of Appeal on circumstantial evidence, through Hamid Sultan JCA in the case of *Aung Tun & Anor v Public Prosecutor* [2014] 1 MLJ 784 had this to say:

> [11] Motive may be essential if it is a case where the prosecution is relying on circumstantial evidence. Unlike common law offence of murder, the statutory offence of murder or manslaughter based on ss 299 and 300 of the Penal Code strictly does not require motive as an element to be proved. If at all evidence of motive is introduced by the prosecution where direct evidence is available for homicide then it is only meant to strengthen the probative force of the prosecution case and/or to negate the defence of self defence or provocation, etc at the earliest stage.

(vii) the learned counsel for the appellant's submission on the confession statements to PW13 and PW16 were not subjected to maximum evaluation test does not have merit. The issue is one of credibility and finding of facts. We do not see any reason on record to warrant the rejection of the evidence of PW13 and PW16 and no reason to demonstrate that the 'fairness rule' complained by the learned counsel in reliance of the case *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 have been breached in the instant case. Very importantly the appellant was not convicted solely on the confession made to PW13 and PW16. The confession statements in the instant case passes the test of relevancy as well as admissibility. The only issue if any will be on the probative force and that falls within the realm of the trial judge; and

(viii) the complaint of the learned counsel that the pathologist evidence and the failure of the learned judge to discuss the differences between ss 299 and 300 of the Penal Code has no significant nexus more so as we have stated earlier on a conviction on circumstantial evidence and there was no doubt as to the death and its cause.

[10] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test,

(see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[11] We are of the considered view that even without the admission of the two CCTV recordings, the case against the appellant has been proved beyond reasonable doubt based on all the relevant circumstantial evidence of this case. It is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

We hereby order so.

Appeal dismissed.

Reported by Ashok Kumar